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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

DIRECT SHOPPING NETWORK,  
LLC,

Plaintiff and Respondent,

v.

INTERWEAVE PRESS, LLC,

Defendant and Appellant.

B216612

(Los Angeles County  
Super. Ct. No. EC048553)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura A. Matz, Judge. Reversed.

Gordon & Rees, Peter Schwartz and Christopher Wagner for Defendant and Appellant.

Yale & Baumgarten, Eugene P. Yale and David W. Baumgarten for Plaintiff and Respondent.

Appellant and defendant Interweave Press, LLC (Interweave) moved to strike claims for trade libel, interference with contract, and intentional and negligent interference with economic relations under Code of Civil Procedure section 425.16 (section 425.16), the so-called anti-SLAPP statute.<sup>1</sup> Interweave contended that the claims arose out of conduct -- free speech in a public forum in connection with a public issue -- protected by the provision. The trial court agreed that the claims arose out of protected conduct, but concluded that respondent and plaintiff Direct Shopping Network, LLC (DSN) presented a prima facie case to support its claims and denied the motion. We conclude that DSN failed to meet its burden and reverse.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *A. Underlying Facts<sup>2</sup>*

DSN's lawsuit involves gemstones derived from a mineral with the scientific name "plagioclase feldspar." Within this classification, minerals are divided into six sub-classifications based on their proportions of sodium and calcium. The two sub-classifications at issue here are andesine and labradorite, both of which can be used to make gemstones.<sup>3</sup> The most common color of gem-quality feldspar is yellow. Mines in Mexico produce relatively large quantities of yellow feldspar. Mines in Oregon

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<sup>1</sup> "SLAPP is an acronym for 'strategic lawsuit against public participation.'" (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 732, fn. 1.)

<sup>2</sup> These facts were set forth in declarations filed by Interweave and were not disputed by DSN.

<sup>3</sup> Andesine and labradorite are apparently so close in composition and appearance that the names are sometimes used interchangeably, and a stone may be referred to as "andesine-labradorite." As will be seen, in the publications discussing the gemstones at issue in this litigation, all these terms are used.

produce smaller quantities of red and green feldspar.<sup>4</sup> Red feldspar from Oregon, generally called “sunstone,” is significantly more expensive than Mexican yellow feldspar due to its relative scarcity.<sup>5</sup>

For a time Oregon was the only known source of red gem-quality feldspar. In the early 2000’s, multiple dealers began to sell inexpensive red feldspar gemstones. These inexpensive red feldspar gemstones were called andesine or andesine-labradorite and were said to come from mines in Mongolia, Tibet or the Congo.<sup>6</sup> Robert James, a gemologist and president of the International School of Gemology in San Antonio (ISG) became suspicious of this sudden influx of red gem-quality feldspar from previously unknown sources. James conducted a number of tests on inexpensive red feldspar gemstones obtained from various Internet and television sources, including DSN, and concluded in a report that this inexpensive red “andesine” or “andesine-labradorite” was treated yellow feldspar from Mexico. Interweave, publisher of *Colored Stone* magazine and producer of the content of Colored-Stone.com, publications that covered the gemstone industry, published James’s report and also published articles of its own essentially agreeing that the material was artificially treated and from Mexico.

#### B. *DSN’s Complaint*

DSN brought suit against James, *Colored Stone* magazine, Colored-Stone.com and Interweave for trade libel, interference with contract and intentional and negligent

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<sup>4</sup> The color comes from the presence of iron or copper when the stones are formed. Yellow stones contain iron; red and green stones contain copper.

<sup>5</sup> Green feldspar is apparently equally rare and valuable, but this lawsuit centers around red feldspar.

<sup>6</sup> DSN generally referred to its product as “andesine.”

interference with prospective economic advantage. The complaint described DSN as a “designer, producer, marketer, and seller of fine jewelry products, including . . . products incorporating gemstones commonly referred to as ‘andesine.’” The complaint alleged that defendants published “false and defamatory” statements concerning andesine products marketed and sold by DSN. The complaint did not specify the nature of the statements or the date they were made. Nor did it specify any specific party or parties who had refused to do business with DSN as a result of the statements. The complaint alleged generally that as a result of defendants’ actions, DSN had suffered “lost profits and lost business opportunity, in an amount presently unknown” and had suffered “damages . . . in an amount presently unknown.”

*C. Interweave’s Motion to Strike Under Section 425.16*

Interweave brought a special motion to strike pursuant to section 425.16, contending the statements made concerning DSN’s gemstones were made in a public forum on an issue of public interest and that DSN could not demonstrate a probability of success on the merits. Because DSN had not specified the statement or publications on which its suit was based, Interweave identified the specific articles involving red feldspar that were published in Colored Stone magazine and/or on Colored-Stone.com prior to the complaint. These articles are summarized below, along with the other evidence presented with Interweave’s moving papers.<sup>7</sup>

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<sup>7</sup> Interweave identified additional articles apparently published by James but not re-published by Interweave. Because James is not a party to this appeal, we do not discuss his separate articles at length.

### *1. March 25, 2008 Publication*

On March 25, 2008, Colored-Stone.com sent to its list of subscribers an e-mail entitled “The Furor Over Feldspar[.]” The e-mail stated that red feldspar was relatively rare and expensive and came from Oregon, but that recently, “look-alikes” costing substantially less had come on the market. Sellers of the cheaper stones reportedly marketed them as an “affordable alternative” to Oregon sunstone and described them as “all-natural.” According to the e-mail, however, one of the marketers of this product, Jewelry Television, had recently “admitted stones were treated to attain their beautiful colors” and had offered buyers full refunds. The e-mail included a statement from “a buyer at [Jewelry Television]” who had reportedly said the network believed the stones had been treated with heat and tumbled. According to the e-mail, “that would seem to indicate diffusion of copper -- sunstone’s chief coloring agent -- was involved” and that “Mexico, which produces tons of straw-yellow low- or no-copper labradorite, may be the source of the so-called andesine.” The article contained “conjecture” and “theor[y]” about how the treatment process described by the source might work and stated that “GIA” (presumably, the Gemological Institute of America) and Caltech were conducting research on the “suspect feldspars” in order to determine “the exact cause of their color.”

The article expressed the following “fear[.]”: “[Treatment] would only make sense on copper-free material such as that from Mexico, which is producing tons of straw-yellow, low- or no-copper labradorite and selling it to Asian dealers. If Mexican feldspar is the culprit, then you can bet the ranch that this south-of-the-border labradorite owes its color to oven alchemy.” The article further stated: “No one really knows where any of the subject andesine is coming from. Sellers say it’s from Tibet, the Congo, Tanzania -- all of the sources mentioned in most standard gemology textbooks.”

The email contained a lengthy discussion of Oregon sunstone production, and recommended that buyers “stick[] with Oregon sunstone” if they wanted “all-natural, all-American feldspar.” Although “higher [priced] than misrepresented felon feldspars from Mexico, . . . that’s a fair price to pay for tamper-free labradorite.”

## *2. May 12, 2008 Publication*

On May 12, 2008, Colored-Stone.com sent out an e-mail entitled “Coming to a Courtroom Near You: The Labradorite Litigations.” The e-mail stated that “[o]n the surface, the new red and green labradorite that you’ve been seeing on TV in astonishing abundance looks very much like Oregon sunstone” but that “[e]vidence is mounting to suggest that the resemblance . . . is nothing more than superficial -- a result of sophisticated chemical face lifts in gemological beauty parlors” which “explain[s] why TV feldspars have been selling for a fraction of the price of their all-natural northwest American counterparts.”

Referring to statements from sellers of the gemstones, the e-mail reported “the new look-alikes . . . are supposedly coming from cheaper-labor, less environmentally restricted mines in Tibet, Mongolia, and the Congo.” The e-mail quoted James who, referring to the alleged discovery of “three labradorite deposits in close succession,” asked rhetorically: “What are the chances of such a sudden profusion for a previously rare gem known only to occur in one small area?” The e-mail answered: “The chances are slim to nil, especially when the source of finished stones is Thailand: the world’s leading gem rehab center. TV labradorite, many consumers who bought it now believe, is just the latest gemstone fraud perpetrated on the world market by Thai gem renovation experts.”<sup>8</sup>

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<sup>8</sup> Apparently, there had been a recent scandal involving sapphires artificially treated in Thailand to change their color.

The e-mail discussed the “preliminary” results of tests James had performed on “a handful of TV feldspars.” According to the e-mail, one test involved breaking a stone, which revealed that the color was confined to the surface. The e-mail also reported that “[d]ealers and gemologists” had “lambasted” James “on the basis of outsider status and his use of what they considered circumstantial and sketchy evidence.”

The e-mail went on to quote an anonymous source, who had reportedly said: “‘The beauty [of “TV labradorite”] is phony, nothing more than a factory add-on.’” It also purported to quote unnamed gemologists as saying that the labradorite in question “is benefiting from the latest advance in treatment technology . . . most likely accomplished by diffusing copper and hematite into stone surfaces” and stated that when the unnamed gemologists “let their imagination run” they mention two things: “1) the source of the ‘new-find’ labradorite is Thailand, and 2) Thailand has elevated diffusion coloring of gems to a fine art.”

The e-mail reported that the sellers of the suspect gemstones said they were from Tibet, Mongolia or the Congo, but “balked” at showing dealers and gemologists rough stones and further reported that, according to James, the only video footage from Tibet showed “straw-colored” stones. The e-mail repeated the story about Jewelry Television’s refund offer, predicting “[o]ther networks will probably have to do the same,” and concluding: “As long as gem alchemy is alive and well in Thailand, dealer claims as to the integrity of their gems will have to be taken with skepticism.”

### 3. *July 22, 2008 Publication*

On July 22, 2008, Colored-Stone.com distributed via e-mail the draft of a report written by James entitled “The Andesine Report.”<sup>9</sup> The report stated that James and his associates had acquired over 100 specimens “from every dealer source of ‘andesine[-]labradorite’ that [they] could find” including DSN, Jewelry Television, eBay and Gemfrance.com. Included within the specimens tested were purportedly “‘all[-]natural’” andesine gemstones purchased from DSN bearing the 2008 Beijing Olympics logo. According to James, “most” dealers of the inexpensive red feldspar had “changed their original story that all of the material is totally natural and untreated.” However, “most” were also claiming that the yellow feldspar was “heated only” to create the red and green colors. James posited that “iron based yellow feldspar” could not be turned into “copper based red and green andesine” through use of heating alone, and that the low-cost red feldspar had not only been heated, but also infused with a new material.

To test his hypothesis, James compared the gemstone samples collected from the various sellers with known Mexican yellow feldspar using a “Raman microscope.” The inexpensive red feldspar he tested had “Raman scans” virtually identical to the

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<sup>9</sup> On July 23, Colored Stone sent a disclaimer to those who had been e-mailed the James article. The disclaimer stated: “Yesterday, you received an email from Colored-Stone.com with a feature entitled ‘The Andesine Report’ written by Mr. Robert James. Please note that the email was sent as the result of a test error. It is our policy to review and verify all content within our magazines and e-newsletters prior to publication. Yesterday’s email was sent as part of a test that was inadvertently routed to our entire distribution list before we had completed our verification review. As soon as we have completed that review, we will follow up with another email. [¶] In the meantime, please note that the content in yesterday’s email was written entirely by Mr. James and reflects his findings and conclusions only. While we have great respect for Mr. James and his position within the gem community, he is not an employee of Colored Stone, nor should his article be considered as an accurate reflection of the findings or opinions of our staff.”



scans for Mexican yellow feldspar.<sup>10</sup> According to the report, if the samples came from mines on the other side of the world, they would not have been expected to produce Raman scans like those produced by Mexican feldspar. James also took images of the inexpensive red feldspar samples through an “immersion cell.”<sup>11</sup> The enhanced images depicted a green core surrounded by red. According to the report, if the colors had formed naturally, the red and green pattern would have been different.<sup>12</sup>

To perform his final test, James obtained very inexpensive red feldspar on eBay. He hypothesized that the treatment the stones had, theoretically, been subjected to would not have taken well on certain inferior stones, and that rather than discard such stones, the parties dealing in them would have sold them at very low prices on the Internet. James believed that it would be easier to detect treatment in inferior stones. After examining some inferior and very inexpensive red feldspar closely under extreme magnification, James reportedly observed within natural weak spots in the stones traces of the material used to color the stones in the process of diffusing.

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<sup>10</sup> The report did not explain or define the terms “Raman Microscope” or “Raman scan,” but included depictions of the scans.

<sup>11</sup> The report did not explain or define the term “immersion cell,” but included pictures of the images.

<sup>12</sup> In this regard, James’s theory was supported by the declaration of Joel E. Arem, holder of a doctorate in mineralogy, who stated: “Because the copper content of feldspars that form in lava flows is rarely uniform, ‘Oregon Sunstones’ are often multi-colored -- red in the center where the copper content is highest, followed by green, and then clear where there is minimal copper content.” Dr. Arem further stated that the “pattern of zoning” James observed in the inexpensive red feldspar he tested -- a green core surrounded by red -- “is the opposite of what is observed in natural green and red feldspars from Oregon” and that “[u]ntil the mass-marketers of these gems can prove that a mine exists capable of producing thousands of carats of large and perfectly uniform red and green feldspar, I too will share Mr. James’s skepticism about the source of these gems.”

In describing one particular stone in which “the red diffusion material [could be seen] still stuck in the ribbon that never made it into the interior of the gemstone,” James called it “the proverbial smoking gun,” “the answer” and “[p]roof positive that this ‘andesine[-]labradorite’ claimed to be untreated and from the Congo, is actually diffusion treated yellow feldspar from Mexico that stopped off in China or Thailand and was supposed to have been on its way to a local US jewelry shopping channel.” He stated that his findings meant that “thousands of consumers have been defrauded of millions of dollars by this scheme.” He named DSN as one of the entities who “perpetrated this fraud” or “turned a blind eye to allow it to continue.”

#### *4. August 21, 2008 Publication*

On August 21, 2008, Colored-Stone.com sent an e-mail entitled “Entrance Strategy.” The e-mail had the following subtitle: “It isn’t easy to force copper into feldspar. So when gemologist Robert James said copper diffusion was the real cause of red and green in Mexican feldspar sold as natural on TV, and made the official gem of the 2008 Beijing Olympics, no one took him seriously -- until he started snapping pictures to prove his point.” Referring to James’s July 22 report, the e-mail stated that James’s conclusion that “tons of feldspar sold on TV and the Internet as all-natural were, in reality, artificially colored by copper diffusion” had “pitted him against some of the world’s leading gem labs which were sent this material to test for treatment and, finding none, issued reports saying it was natural.” The e-mail described the photographs in James’s report as “le[aving] those who saw them little choice but to entertain the thought that maybe TV andesine owed its color to some sort of gimmickry.” The e-mail noted that the andesine in question “had been adopted as the official gem of the 2008 Beijing Olympics. . . . If the color was artificial, the ensuing scandal would be global in scope.”

The e-mail reiterated that the publication of James's draft report on July 22 had been accidental, but stated that the disclaimer sent the next day "wasn't meant . . . to be a retraction." The e-mail said that before learning of James's findings, Colored-Stone.com had "already suspected a potential scandal." These suspicions reportedly came from "sources," including "a geologist who had studied the material and a dealer who had bought large quantities of it" and were "willing to bet the material was Mexican" because "Mexico was the only known country with a deposit of transparent feldspar capable of supplying enough material for sustained large-scale TV, Internet and Olympics marketing campaigns." The e-mail said that Colored-Stone.com's suspicions were also aroused by the fact that "no one had ever been able to obtain certified Congolese, Tibetan or Mongolian andesine rough from which the new red and green 'all-natural' andesine was being cut." The e-mail also reported that Colored-Stone.com had received "reliable tips" in 2007 that "in all likelihood the TV andesine was not as purported, from the Congo or even Tibet and Mongolia."

With respect to treatment, the e-mail said that experts "who tried to induce red and green in yellow feldspar" and who "shared our suspicions" said they had failed. However, "just because they failed didn't mean others hadn't succeeded." According to a source, a "Japanese observer" reported he had seen the treatment process in action.

Returning to James's July 22 report, the e-mail stated that the report "made a convincing case for what many in the trade already feared: that TV and Internet red and green andesine sold as Asian in origin and all-natural in color was neither." Finally, the e-mail stated that the assertions made in James's report were "vindicated" by the following: (1) the Summer 2008 issue of *Gems & Gemology* contained a report of a test on a red andesine gemstone purportedly from China which showed "suspicious 'red color concentrations around surface-reaching channels'"; (2) Thai Gems, "a major Internet seller of red andesine," reclassified its andesine as "colored by 'bulk diffusion Fe/Cu'"; (3) the Asian Institute of Gemological Studies posted James's

report on their Web site; and (4) the Gemological Association of New Zealand asked for permission to publish it in their quarterly. The e-mail included a statement that James's conclusion that the inexpensive red andesine samples he and his associates obtained were "“virtually identical”" to Mexican feldspar caused "the validity of claims that the material was from Africa or Asia" to go "[p]oof."

### *5. Demand for Retraction*

On September 5, 2008, Interweave received a letter from counsel for DSN. The letter stated that DSN had recently discovered that Interweave had made "false and defamatory statements concerning the source and origin of its Red Andesine bearing the 2008 Beijing Olympic mark" including, but not limited to, "assertions that Mexican yellow feldspar is the source of DSN's Red Andesine bearing the 2008 Beijing Olympic mark." The letter said that "reputed experts in the field" had established that "DSN's Red Andesine bearing the 2008 Beijing Olympic mark is not Mexican Feldspar; it is from China." The letter demanded that Interweave "immediately retract any and all publications asserting that DSN's Red Andesine bearing the 2008 Beijing Olympic mark is Mexican Feldspar or is otherwise not from China."

Interweave's counsel responded, stating that Interweave was willing to "publish a Letter to the Editor from DSN as to DSN's 'conclusive evidence' of the authenticity of its Red Andesine bearing the 2008 Beijing Olympic mark."

### *6. November 4, 2008 Publication*

On November 4, 2008, Colored Stone's e-mail newsletter published an article entitled "This Red Scare Is Real." The article discussed the findings and conclusions of John Emmett, who operated a firm which developed gemstone color and clarity enhancement methods. According to the article, Emmett and his partner conducted

experiments to see if “suspicions about the artificial nature of the color of TV and Internet andesine were plausible” and concluded “they were.”<sup>13</sup> Emmet obtained samples of yellow feldspar from Oregon, Mexico and “material represented [by] the donor (Jewelry Television) as having come from China.” After subjecting the samples to various processes, Emmet reportedly found that “[s]ome stones turned completely red while others exhibited red rinds around the edges as well as other phenomena.” The article reiterated the “suspicion” that “newcomer” red feldspar “was, in reality, pale yellow material from Mexico that had been diffused with copper to induce red coloration.”

### *7. James Declaration*

In a declaration in support of Interweave’s motion to strike, James stated that he was a gemologist and teacher with more than 35 years of experience in the jewelry and gemstone industry. He stated that in 2008, at the request of consumers, he began conducting research in ISG’s laboratory into the nature of the andesine and andesine-labradorite being marketed by television jewelry channels. He published several articles prior to preparing the July 22, 2008 report. In his first article, he said that these gemstones shared certain properties with feldspar found in India. In his next article, he discussed the diffusion process used to enhance sapphires, rubies and topazes. In his third and fourth articles, he presented additional evidence to support his theory that the inexpensive red feldspar had been color enhanced and specifically disputed the sellers’ claim that the gemstones had been heat treated only. After the July 22 report was published, he specifically examined gemstones bearing the 2008 Beijing Olympic logo

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<sup>13</sup> According to the article, Emmett and his partner had been involved in uncovering the truth about the treated Thailand sapphires that had been the subject of a prior scandal in the gemstone industry.

and published his conclusion that the andesine was likely the same material written about in the July 22 report.

In September 2008, James saw DSN's president on camera claiming that the 2008 Beijing Olympic andesine sold by DSN was "all natural and untreated." He wrote another article concerning his suspicions about DSN's Olympic andesine and "invited DSN to visit the ISG office in San Antonio, review [his] research, and submit additional stones for testing." DSN did not respond.

#### 8. *Class Action Lawsuits*

Interweave asked the court to take judicial notice of class action lawsuits filed in 2008 against DSN and Jewelry Television, seeking refunds for purchases of red or green "andesine-labradorite." The court agreed to take judicial notice that such lawsuits had been filed, but not of the truth of any matter asserted in the complaints.

##### D. *DSN's Opposition to Interweave's Motion to Strike*

DSN opposed Interweave's motion to strike, contending that its claims did not arise out of an act of free speech in connection with an issue of public interest and therefore its complaint was not subject to an anti-SLAPP motion to strike. DSN further contended that it could establish a probability of prevailing on the merits because (1) the statements at issue were assertions of fact, not opinion; (2) the statements were provably false; and (3) the statements were made with actual malice. While DSN's complaint had not identified the allegedly defamatory statements, its opposition focused on the July 22 and August 21, 2008 publications and the contentions that the gemstones being sold as red andesine or andesine-labradorite were "artificially treated" and "nothing more than treated Mexican yellow feldspar."

To establish the probability of success on the merits, DSN presented the declaration of Arthur Garabedian, the President and managing member of DSN.

Garabedian stated that in 2006, DSN purchased red andesine gemstones from Ande Jewelry & Mineral Company (“Andegem”), which represented that the andesine was natural and from China. To determine the authenticity of the gemstones, DSN sent samples to a gemological testing center operated by the American Gem Trade Association (AGTA). According to Garabedian, the AGTA testing center concluded the sample stones were natural.<sup>14</sup>

Garabedian further stated that in 2008, DSN obtained the right to market certain andesine gemstones as “Olympic red andesine.” That same year, DSN learned of James’s claim that red andesine being sold by Jewelry Television was actually Mexican yellow feldspar. DSN had “samples” of its Olympic red andesine tested by George R. Rossman, a professor of mineralogy at Caltech. Dr. Rossman concluded that the samples given to him for testing were not Mexican feldspar.<sup>15</sup>

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<sup>14</sup> DSN did not present a declaration from anyone involved with AGTA. Attached to Garabedian’s declaration was a two-page report dated June 14, 2006 on AGTA letterhead. The report covered a single “reddish orange” gemstone, which it described as “natural andesine.” The report contained the following disclaimers: “[I]t is acknowledged that some treatments commonly applied to gem material are not currently detectable” and “[AGTA] often provides its gem reports at a relatively small fee compared to the present and/or potential value of the articles described on them only because these reports are subject to the following limitations on the liability of [AGTA] [¶] . . . [¶] Reports issued are not guarantee, valuations or appraisals, and [AGTA] makes no representation or warranty regarding the reports issued or the articles described in them.” Interweave objected to Garabedian’s characterization of the AGTA report and to the report itself on hearsay and lack of foundation grounds. The court overruled the objections. Interweave assigns error to that ruling on appeal.

<sup>15</sup> Garabedian did not state how the samples were collected. DSN presented a two-paragraph declaration from Dr. Rossman in which he stated that he analyzed “DSN gemstones bearing the Olympic mark” and “compared the properties of those stones against yellow feldspar from Mexico.” He concluded that “the DSN stone[s] bearing the Olympic mark are not Mexican feldspar.” According to Dr. Rossman’s report, which was attached to his declaration, the Mexican feldspar, obtained from Chihuahua, was properly classified as labradorite, whereas the DSN gemstones “straddle the nomenclature boundary between andesine . . . and labradorite.”

Garabedian's declaration stated that the contention that "there are no known sources of red andesine mines in China ha[d] been disputed by first hand accounts," citing a Winter 2008 article in GemNews International written by Ahmadjan Abduriyim. In the article, Abduriyim claimed to have visited a feldspar mine in "the Chinese autonomous regions of Tibet and Inner Mongolia," and further claimed to have seen red, green and yellow stones being mined.<sup>16</sup>

With respect to DSN's damages, Garabedian's declaration stated: "DSN has lost substantial sales as a result of the defendants' false assertions that our Olympic red andesine products are not from China, but instead are Mexican feldspar." There was no other evidence presented to support damages.

In its opposition, DSN sought to establish collusion between James, Interweave and Oregon sunstone producers. Garabedian stated that he had obtained an "e-mail blast" in which Interweave solicited subscriptions based on its publication of James's July 22 report. The e-mail, attached as an exhibit to the declaration, stated that Interweave had "allied with" James, and described the magazine and James as "[t]wo forces for good joined together to win a major victory." The e-mail advised potential subscribers that Interweave would donate five dollars from every paid subscription to James's institute, ISG, "for its continued research into relevant projects which make jewelry shopping safer for consumers." Garabedian's declaration further stated that he had learned that "members of the Oregon sunstone industry provided funding to James and ISG to purchase the Raman microscope" and that "Oregon sunstone

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<sup>16</sup> A copy of the article was attached to Garabedian's declaration, but there was no declaration from its author. Interweave objected to admission of Garabedian's statements and the article on hearsay and lack of foundation grounds. The court sustained the objections.



advertisements appear adjacent to articles disparaging DSN products in Colored Stone [magazine].”<sup>17</sup>

#### *E. Request to Conduct Discovery*

Along with its opposition, DSN filed an application for an order to conduct “anti-SLAPP discovery.” The moving papers stated that DSN sought leave to conduct discovery (1) to “explore” the GemNews International story that natural red andesine was being mined in Tibet; and (2) to depose James and Interweave concerning “the nature and extent of their financial inter-relationship, as well as their financial relationship with the Oregon sunstone industry, including the funding of the Raman microscope,” in order to “flesh out the malice issue in the event the court believes additional evidence is required.”<sup>18</sup>

#### *F. Reply*

In its reply, Interweave presented a second declaration from Dr. Arem, in which he stated he had attended a seminar given by Dr. Rossman in 2009, in which Dr.

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<sup>17</sup> Attached to Garabedian’s declaration was a document which appeared to have been taken from ISG’s Web site thanking a number of persons for donating funds toward the purchase of the Raman microscope. Many of the donating individuals were identified by a photocopy of their business cards. One of the business cards was from an individual involved with a sunstone mine. In addition, in one of the articles published by James, but not Interweave, which was attached to James’s declaration in support of the motion to strike, James stated that an Oregon sunstone dealer had donated a sunstone to support the purchase of the Raman microscope.

<sup>18</sup> At the hearing on the motion to strike, counsel for Interweave clarified that Interweave was not raising malice as an issue. DSN reiterated its request to delay the ruling on the motion to strike so that it could take the deposition of the Japanese author who claimed to have seen a feldspar mine in China, or to otherwise establish that there were andesine mines in China. The court denied DSN’s requests for further discovery, and DSN has not appealed the ruling.

Rossman expressed the opinion that any red feldspar not originating from Oregon had been subjected to treatment with copper. At that seminar, Dr. Rossman also purportedly expressed the belief that the red andesine at issue was not from Tibet, but exhibited a profile consistent with origin in Mongolia or the China-Mongolian border.

### *G. Trial Court's Ruling*

In a colloquy with counsel for DSN, the court noted that the complaint failed to identify the allegedly false statements: “It seems like a moving target. Every time we start talking about it, we’re all taking about different things [be]cause we don’t know exactly what the claim is.” Counsel for DSN responded: “It’s not a moving target . . . because my demand . . . for a retraction letter . . . expressly lays out ‘you’re making a false claim that this stuff is Mexican feldspar and it’s not.’ That has been the claim from day one. . . . [defendants’] assertions of fact that Olympic andesine is Mexican feldspar . . . that’s what I’m attacking.”<sup>19</sup>

The court denied Interweave’s motion to strike. It stated in its order that Interweave had “met the initial burden of establishing that the claims arise from protected activity, which was conducted in a public forum and which concerned matters of public interest.” The court found, however, that DSN had “met its resulting burden to demonstrate a probability of prevailing on the claims at issue.” The court explained: “Under the totality of the circumstances, considering the context, audience and use of language, the repeated reference to fact, proof, scientific evidence and testing, James’s status as an expert in the field and the unequivocal nature of the reports, . . . there are provable facts at issue, rather than merely opinions and theories” and DSN “has produced admissible evidence, which if credited by the trier of fact,

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<sup>19</sup> Earlier, counsel for DSN had similarly said that “the color issue is distinct from origin” and that “[t]he focus of [DSN’s] claim is origin.”

would support a prima facie showing of falsity of those purported facts.” Interweave’s appeal followed.

## **DISCUSSION**

“Section 425.16 was enacted in 1992 to provide a procedure for expeditiously resolving ‘nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue.’” (*Hailstone v. Martinez* (2008) 169 Cal.App.4th 728, 734, quoting *Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) “It is California’s response to meritless lawsuits brought to harass those who have exercised these rights. [Citation.] This type of suit, referred to under the acronym SLAPP, or strategic lawsuit against public participation, is generally brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff.” (*Hailstone v. Martinez, supra*, 169 Cal.App.4th at pp. 734-735.)

A defendant moving to strike a cause of action under section 425.16 has the initial burden of proving the cause of action arose from the defendant’s exercise of the right of petition or free speech in connection with a public issue. (§ 425.16, subd. (b)(1); *Kolar v. Donahue, McIntosh & Hammerton* (2006) 145 Cal.App.4th 1532, 1536; *Kyle v. Carmon* (1999) 71 Cal.App.4th 901, 907.) Preliminarily, we review the trial court’s ruling that Interweave met its burden of establishing that the claim at issue was subject to a motion to strike under section 425.16.

### *A. Public Issue*

Section 425.16 applies to all “cause[s] of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue.” (*Id.* at subd. (b)(1).) A defendant establishes that the plaintiff’s cause

of action is based on an act in furtherance of the defendant's right of petition or free speech "by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e) . . . ." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, quoting *Braun v. Chronicle Publishing Co.* (1997) 52 Cal.App.4th 1036, 1043.) Subdivision (e) of section 425.16 defines an act in furtherance of a person's right of petition or free speech to include "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." (§ 425.16, subd. (e)(3).) DSN does not dispute that the suit arose out of Interweave's exercise of free speech in a public forum, but contends that the publications at issue did not concern an issue of public interest.<sup>20</sup> The trial court correctly rejected this contention.

Issues of public interest are generally said to involve "a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations][,] or a topic of widespread, public interest." (*Hailstone v. Martinez, supra*, 169 Cal.App.4th at p. 737, quoting *Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924.) This court has said that "an issue of public interest' within the meaning of section 425.16, subdivision (e)(3) is any issue in which the public is interested. . . . [T]he issue need not be 'significant' to be protected by the anti-SLAPP statute -- it is enough that it is one in which the public takes an interest." (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1042, italics deleted.) In considering whether a matter is of public interest, "[c]ourts have recognized the importance of the public's access to consumer information." (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th

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<sup>20</sup> (See *Wilbanks v. Wolk* (2004) 121 Cal.App.4th 883, 895, 897 [holding that information published on defendant's Web site and therefore, "accessible to anyone who chooses to visit her Web site," was made in a public forum].)

at p. 899, quoting *Paradise Hills Associates v. Procel* (1991) 235 Cal.App.3d 1528, 1544, disapproved in part on another ground in *Kowis v. Howard* (1992) 3 Cal.4th 888.) “Consumer information . . . when it affects a large number of persons, . . . generally is viewed as information concerning a matter of public interest,” as long as it “contribute[s] to the public debate.” (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th at p. 898; see, e.g., *Paradise Hills Associates v. Procel, supra*, 235 Cal.App.3d at pp. 1544-1545 [signs posted in yards of purchasers of new homes describing faulty construction were statements concerning public interest]; *DuPont Merck Pharmaceutical Co. v. Superior Court* (2000) 78 Cal.App.4th 562, 564, 566-567 [claim that manufacturer of blood thinner disseminated “false and omissive” information concerning drug’s effectiveness was subject to anti-SLAPP motion because effectiveness of drug used by over a million Americans was an issue of “public interest”].)

In *Wilbanks v. Wolk*, the defendant established a Web site warning consumers of the hazards of viatical settlements, and, in particular, warned about dealing with the plaintiffs, who were allegedly under investigation by the Department of Insurance. The court held that although the plaintiffs were “not in the public eye” and their business practices neither affected a large number of people nor involved “a topic of widespread public interest,” the public issue requirement of section 425.16 was met, because “the viatical industry touches a large number of persons,” “the information provided [was] in the nature of consumer protection information,” and by “identif[ying] the brokers [the defendant] believes have engaged in unethical or questionable practices,” she “provide[d] information for the purpose of aiding viators and investors to choose between brokers.” (*Wilbanks v. Wolk, supra*, 121 Cal.App.4th at pp. 898-900.)

Here, it is similarly clear that the subject matter of Interweave’s andesine publications involved “a topic of widespread public interest” that touched “a large

number of persons.” The evidence presented established that there was and is an ongoing controversy over the marketing of treated gemstones sold to the public.<sup>21</sup> The statements at issue here purported to warn consumers that certain gemstone dealers were selling artificially treated feldspar without expressly identifying it as such or were going so far as to falsely claim that the material was “all natural.” Although the information was of particular interest to those interested in purchasing gem-quality feldspar -- a large enough group of consumers in itself -- the publications’ discussions of gemstone treatment methods and the difficulty of detection was useful to every member of the public who buys jewelry and gemstones. The claims asserted by DSN were directly related to Interweave’s statements on this topic and were aimed at precluding it from continuing to make such statements. There can be no question, therefore, that as the trial court ruled, Interweave met its initial burden of demonstrating that the claims arose from protected activity.

DSN contends that appellant and James “manufactured the alleged ‘public interest’ in red andesine as part of their larger scheme to disparage DSN and advance their own interests relative to Oregon Sunstone” based on their alleged “financial relationship with the Oregon sunstone industry.” DSN points to evidence suggesting that James’s institute, ISG, received financial support from persons involved in the production or sale of Oregon sunstones, and that purveyors of Oregon sunstones advertised in Interweave’s publications. However, DSN cites no authority for the

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<sup>21</sup> Dr. Arem stated in his declaration in support of the motion to strike: “Confirming the nature and source of gems is extremely important within the gemstone industry because ‘all natural’ gemstones are much more valuable than synthetic or color enhanced gems. Moreover, in recent years, color enhancement technologies have advanced to such a degree that altered stones can be difficult to detect (even by a lab). . . . [G]iven the high potential for fraud, it is critical for a healthy gemstone industry that ‘all natural’ gems are accurately identified in the marketplace. . . . [G]ems that have undergone color enhancement treatment must be properly identified because this greatly affects their value.”

proposition that information posted in public forums debating matters of public interest loses its anti-SLAPP protection merely because the speaker has a minor financial interest in the outcome of the public debate.

DSN attempts to rely on *Globetrotter Software, Inc. v. Elan Computer Group, Inc.* (N.D. Cal. 1999) 63 F.Supp.2d 1127, 1130 to support its contention that the speech involved here was not deserving of anti-SLAPP protection. In *Globetrotter Software*, the district court merely stated that it had been “unable to locate any California cases concluding that the ‘issue of public interest’ test is met by statements of one company regarding the conduct of a competitor company” and further stated that “in the absence of clear California authority,” it could not conclude that the Legislature intended lawsuits alleging “trade libel, false advertising or the like in the context of commercial competition” to be “subject to attack as a SLAPP suit.” As later explained in *Integrated Healthcare Holdings, Inc. v. Fitzgibbons* (2006) 140 Cal.App.4th 515, there is no “per se rule excluding all competitor’s statements from anti-SLAPP protection.” (*Id.* at p. 526.) Instead, “each case [must be considered] in light of its own unique facts.” (*Ibid.*) Here, even had the defendants been competitors of DSN -- which they clearly were not -- the statements at issue were not focused on a small audience or a particular entity, but were expressly directed at warning the public about the flood of inexpensive red feldspar available from numerous vendors. The articles were geared toward advising consumers to beware of red feldspar gemstones being marketed as all-natural that could not be traced to an established source. Given the existence of difficult to detect processes capable of transforming common-colored gemstones into stones with more desirable and valuable colors, and the apparent willingness of some dealers to market such stones without advising buyers of their true nature, the matters discussed were of significance to large numbers of consumers.

## B. *Probability of Prevailing*

Once the defendant makes the “threshold showing that the challenged cause of action is one ‘arising from’ protected activity,” the court “then must consider whether the plaintiff has demonstrated a probability of prevailing on the claim.” (Nygard v. Uusi-Kerttula, *supra*, 159 Cal.App.4th at p. 1035, quoting *City of Cotati v. Cashman*, *supra*, 29 Cal.4th at p. 76.) “To show a probability of prevailing for purposes of section 425.16, a plaintiff must ‘make a prima facie showing of facts which would, if proved at trial, support a judgment in plaintiff’s favor.’” (ComputerXpress, Inc. v. Jackson (2001) 93 Cal.App.4th 993, 1010, quoting *Kyle v. Carmon*, *supra*, 71 Cal.App.4th at p. 907.) The plaintiff must have “‘stated . . . a legally sufficient claim,’” and presented to the court “competent, admissible evidence” sufficient to sustain a favorable judgment on that claim. (*Hailstone v. Martinez*, *supra*, 169 Cal.App.4th at p. 736, quoting *Navallier v. Sletten* (2002) 29 Cal.4th 82, 88.) The standard applied by the trial court in determining whether the evidence presented is sufficient “is ‘similar to the standard used in determining motions for nonsuit, directed verdict, or summary judgment,’ in that the court cannot weigh the evidence.” (*ComputerXpress, Inc. v. Jackson*, *supra*, 93 Cal.App.4th at p. 1010; accord, *Wilcox v. Superior Court* (1994) 27 Cal.App.4th 809, 827, 828, disapproved in part on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53.) “The plaintiff need only establish that his or her claim has minimal merit to avoid being stricken as a SLAPP.” (*Hailstone v. Martinez*, *supra*, 169 Cal.App.4th at p. 735.) The question whether the plaintiff has shown a probability of prevailing is reviewed independently on appeal. (*Ibid.*) To determine whether DSN met its burden, we consider separately each claim and the evidence offered in support.



### 1. *Trade Libel*

In its first cause of action, DSN alleged a claim for trade libel. Trade libel is the intentional disparagement of the quality of property that results in pecuniary damage to the plaintiff. (*Nichols v. Great American Ins. Companies* (1985) 169 Cal.App.3d 766, 773.) To be actionable, the defamatory statement must be false and must be a statement of fact; statements of opinion alone will not support a cause of action for trade libel. (*ComputerXpress, Inc. v Jackson, supra*, 93 Cal.App.4th at pp. 1010-1011; *Leonardini v. Shell Oil Co.* (1989) 216 Cal.App.3d 547, 572; *Hofmann Co. v. E. I. Du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397.) To establish trade libel, the plaintiff must plead and prove (1) that the defamatory statement at issue was one “disparaging the quality of [the plaintiff’s] property” that the defendant “should recognize is likely to cause pecuniary loss” (*ComputerXpress, Inc. v Jackson, supra*, 93 Cal.App.4th at p. 1010), and (2) that the statement played “a material and substantial part in inducing others not to deal with [the plaintiff]” (*Erlich v. Etner* (1964) 224 Cal.App.2d 69, 73). The plaintiff “may not rely on a general decline in business arising from the falsehood,” but must instead “identify particular customers and transactions of which it was deprived as a result of the libel.” (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 109.)<sup>22</sup>

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<sup>22</sup> Quoting Prosser, Witkin described the tort of trade libel as “so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.” (5 Witkin, Summary of Calif. Law (10th ed. 2005) Torts, § 645, p. 952.)

a. *Falsity*

In its brief on appeal, DSN identifies two statements of fact that potentially support a claim for trade libel: (1) that the gemstones marketed as Olympic andesine had been artificially treated; and (2) that the origin of the gemstones was Mexico. However, in opposing the motion to strike, DSN presented no admissible evidence to support the contention that Interweave's statements concerning artificial treatment were false. Garabedian stated in his declaration that DSN sent samples of gemstones it purchased from Andegem to AGTA for testing. However, Garabedian's assertion that AGTA had determined the gemstones were "natural red andesine" was hearsay and lacking in foundation. The attached AGTA report itself noted only that the single stone examined appeared to be "natural andesine." Leaving aside whether the report was properly authenticated or was itself hearsay, this single report could not establish that all of DSN's Olympic andesine was natural. Moreover, the report specifically stated that it was subject to numerous limitations and conceded that "some treatments commonly applied to gem materials are not currently detectable." The point of the defendants' publication was that through the use of more advanced testing and observational techniques, treatment became detectable. Thus, the evidence presented by DSN was insufficient to establish the falsity of the statements concerning treatment.<sup>23</sup>

With respect to the origin of the gemstones, DSN presented the report of Dr. Rossman who found differences between DSN's Olympic andesine and Mexican yellow feldspar. This was sufficient to raise a triable issue of fact as to Interweave's statements concerning the origin of the andesine. Although, as Interweave points out,

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<sup>23</sup> At the hearing on the motion to strike, DSN's counsel acknowledged that "[t]he color issue is distinct from origin" and asserted that "the focus of our claim is origin." In addition, DSN's September 2008 letter demanded only that Interweave retract assertions that "DSN's Red Andesine bearing the 2008 Beijing Olympic mark is Mexican Feldspar or is otherwise not from China."

James and Dr. Rossman tested different stones and James offered to make the stones he tested available to DSN, the evidence that Dr. Rossman tested a significant number of DSN gemstones bearing the Olympic mark and found them to be different in composition from Mexican feldspar was evidence from which a trier of fact could conclude that DSN's Olympic andesine was not Mexican in origin.

Interweave contends, however, that the statements were non-actionable opinion. As explained below, while the majority of statements made in the publications were opinions, certain statements concerning the origin of the gemstones purported to state provable fact.

#### b. *Opinion or Fact*

Generally, statements of opinion are considered protected speech. (*Baker v. Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.) “Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.” (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 339-340.) In *Milkovich v. Lorain Journal Co.* (1990) 497 U.S. 1, the United States Supreme Court made clear that the passage from *Gertz* was not intended “to create wholesale defamation exemption for anything that might be labeled ‘opinion.’” (497 U.S. at p. 18.) Prefacing offending statements with the words “[i]n my opinion,” “I think,” or some similar phrase does not necessarily place such statements within the bounds of protected speech. (*Id.* at p. 19.) “If a speaker says, ‘In my opinion John Jones is a liar,’ he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact.” (*Id.* at pp. 18-19.)

California courts generally employ a “‘totality of the circumstances’” test to differentiate between fact and opinion. (*Moyer v. Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724; accord, *Franklin v. Dynamic Details, Inc.* (2004) 116 Cal.App.4th 375, 385; *Kahn v. Bower* (1991) 232 Cal.App.3d 1599, 1607-1608.) “‘First, the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense . . . . [¶] Next, the context in which the statement was made must be considered. . . . [¶] This contextual analysis demands that the courts look at the nature and full content of the communication and to the knowledge and understanding of the audience to whom the publication was directed.’” (*Moyer v. Amador Valley J. Union High School Dist.*, *supra*, 225 Cal.App.3d at p. 724, quoting *Baker v. Los Angeles Herald Examiner*, *supra*, 42 Cal.3d 254, 260-261.) “‘Where the language of the statement is ‘cautiously phrased in terms of apparency,’ the statement is less likely to be reasonably understood as a statement of fact rather than opinion.’” (*Baker v. Los Angeles Herald Examiner*, *supra*, at pp. 260-261, fn. omitted.) The determination whether an offending statement is fact or opinion is a question of law for the court. (*Id.* at p. 260; *Eisenberg v. Alameda Newspapers, Inc.* (1999) 74 Cal.App.4th 1359, 1383.)

Post-*Milkovich*, “the question is not strictly whether the published statement is fact or opinion. Rather, the dispositive question is whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact.” (*Franklin v. Dynamic Details, Inc.*, *supra*, 116 Cal.App.4th at p. 385.) It follows that “[a] statement of opinion based on fully disclosed facts can be punished only if the stated facts are themselves false and demeaning.” [Citations.]” (*Id.* at p. 387; accord, *Integrated Healthcare Holdings, Inc. v. Fitzgibbons*, *supra*, 140 Cal.App.4th at p. 528; *Partington v. Bugliosi* (9th Cir. 1995) 56 F.3d 1147, 1156-1157 “[W]hen an author outlines the facts available to him, thus making it clear that the challenged statements represent his own interpretation of those facts and leaving the

reader free to draw his own conclusions, those statements are generally protected by the First Amendment.”]; *Riley v. Harr* (1st Cir. 2002) 292 F.3d 282, 289 [“[E]ven a provably false statement is not actionable if “it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts . . . .””].)

The majority of the statements in the andesine-related articles published by Interweave are non-actionable opinion. In the March 25, 2008 e-mail, “The Furor Over Feldspar,” the discussion of the inexpensive red feldspar’s origin was clearly the opinion of the author based on disclosed facts. It stated that certain evidence -- the feldspar’s low price, its sudden abundance, the admission from Jewelry Television that the stones it sold were treated, the report from an anonymous source about the nature of the treatment -- “would also seem to indicate” that Mexico “may be the source,” but further stated that “[n]o one really knows where any of the suspect andesine is coming from” because “all is conjecture.” At the same time, the article reported facts from which the reader could reasonably draw the opposite conclusion -- the sellers’ claim that the feldspar was “from Tibet, the Congo, Tanzania” and that these sources were “mentioned in most standard gemology textbooks.” Similarly, the November 4, 2008 publication, “This Red Scare Is Real,” expressed the “suspicion[]” that the “newcomer” red feldspar “was, in reality, pale yellow material from Mexico.” The May 12, 2008 e-mail contained no statement concerning the origin of the inexpensive red feldspar. It merely stated the view that the chances of discovering “three [new] labradorite deposits in close succession” were “slim to nil.” It also reported the statements of sellers of the product that the material was abundant and inexpensive because it came from “cheaper-labor, less environmentally restricted mines in Tibet, Mongolia, and the Congo.”

As noted, DSN failed to specify the allegedly defamatory statement in its complaint. Before the trial court and on appeal, however, DSN does not appear to

dispute that the March 25, May 12 and November 4 publications do not contain trade libel. The only statements identified in its brief or in its opposition to the motion to strike as constituting provably false statements of fact are from the July 22, 2008 publication -- James's "Andesine Report" -- and the August 21, 2008 follow up e-mail, "Entrance Strategy."<sup>24</sup> The July 22 report stated that James's experiments and observations, particularly the Raman scans and his observation of the "smoking gun" gemstone, were "[p]roof positive that this 'andesine[-]labradorite' claimed to be untreated and from the Congo, is actually diffusion treated yellow feldspar from Mexico." The August 21 e-mail included a statement that James's conclusion that the inexpensive red andesine samples he and his associates obtained from various sources, including DSN, were "'virtually identical'" to Mexican feldspar caused "the validity of claims that the material was from Africa or Asia" to "[go] [p]oof[]." With respect to these specific statements, they assert a provable statement of fact, viz., that the inexpensive red feldspar on the market, including DSN's red andesine, originated in Mexico.

The fact that James's report set forth the bases for his conclusion concerning the origin of the tested stones does not render the statements non-actionable. In setting forth his testing methods, James represented that the Raman scan was the definitive method of establishing similarity between stones and their origin: "[I]f there are, indeed, numerous sources for red and green 'andesine labradorite' then those sources should produce variable Raman scans." His representation that they "did not" prompted the declaration that "all of [the allegedly andesine samples scanned with the

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<sup>24</sup> DSN's brief also references an August 20, 2008 publication written by James. There is no evidence, however, that Interweave re-published this article. Moreover, the article's statements on which DSN focuses do not say that DSN's red andesine originated in Mexico. The August 20 article alludes to the "famous Raman scan" described in the July 22 report, but does not describe it or its findings. The August 20 article also states that "2008 Beijing Olympic Andesines" from DSN are "exactly the same" as andesine sold by other dealers, but appears to refer to its "bulk diffusion treat[ment]" rather than its origin.

Raman microscope] proved to be . . . well, Mexican feldspar.” Interweave’s statement in the August 21 follow up was equally definitive and unqualified. The statements purported to state facts about the origin of the gemstones and the accuracy of James’s testing method for determining origin.

We find support for our conclusion in *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344. There, the defendant published books in which she claimed to have tested the plaintiff’s products with an instrument of her own devising, and that the products contained benzene, a known carcinogen. The court held that the statements concerning the plaintiff’s product were “in no sense opinions” because they were not “cast in terms of apparency[,] or hesitation with respect to the question of whether the products [she] tested contain[ed] benzene.” (*Id.* at pp. 1354-1355.) The books contained a disclaimer stating that the “opinions” they expressed were “based on [the defendant’s] scientific research” and on “specific case studies,” but the court held that this reinforced the existence of “a factual basis for [the defendant’s] statements” and “reinforce[d] the notion the book’s contents [were] based on facts rather than opinion or theory.” (*Id.* at p. 1355.) Similarly, James’s July 22 report stated that he had performed a scientific test -- a Raman scan -- and that the test conclusively showed that the inexpensive red feldspar on the market was Mexican. There was no equivocation or doubt. Interweave published the July 22 report and also published its own interpretation shortly thereafter, stating that the report had established the origin of the stones. The statements with respect to origin were statements of fact rather than opinion and were, therefore, potentially actionable.

### *c. Defamatory or Derogatory Nature*

Our conclusion that the published statements concerning the stones’ place of origin constituted potentially actionable assertions of fact and that DSN presented evidence sufficient to demonstrate the possibility that those statements were incorrect

does not end our inquiry. To defeat Interweave’s motion to strike, DSN was required to demonstrate a prima facie case of trade libel. Trade libel is the disparagement of the “quality” of a product. (*Nichols v. Great American Ins. Companies, supra*, 169 Cal.App.3d at p. 773.) Actionable comments are limited to those that the defendant “should recognize [are] likely to cause pecuniary loss.” (*ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 1010) and that play “a material and substantial part in inducing others not to deal with [the plaintiff]” (*Erlich v. Etner, supra*, 224 Cal.App.2d at p. 73).

The thrust of James’s July 22 report was that stones marketed as “all-natural” andesine were, in fact, color-infused. Six of the nine pages of the article were devoted to demonstrating that filler material had been used to artificially induce the red and green colors. The sole purpose of initially testing the samples to determine whether they were similar or identical to Mexican feldspar was to support the hypothesis that the stones had been artificially treated: as all known Mexican feldspar was yellow, if the feldspar originated in Mexico, its natural color was yellow. The statement that a gemstone is not “all natural” but has been artificially treated by heat and the incorporation of foreign material to cause it to turn a different color is obviously disparaging of its quality.<sup>25</sup> As noted above, however, DSN produced no evidence that the claims of color treatment were false. It purported to challenge only the statements concerning origin. With respect to those statements, DSN failed to present evidence that such statements, standing apart from the statement concerning artificial treatment, would be understood in a disparaging sense or persuade a consumer to avoid the product. (See *ComputerXpress, Inc. v. Jackson, supra*, 93 Cal.App.4th at p. 1011 “[W]here a statement is ambiguous or susceptible of an innocent meaning, it is

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<sup>25</sup> It was, in any event, supported by the declaration of Interweave’s own expert, Dr. Arem.



incumbent upon the plaintiff to plead the facts showing its defamatory meaning.”]; *Nichols v. Great American Ins. Companies, supra*, 169 Cal.App.3d at pp. 773-774 [to support trade libel, statement must be “understood in its disparaging sense” and that understanding must be “a reasonable construction of the language used”; where statements are “ambiguous or susceptible of an innocent meaning . . . it is incumbent upon the plaintiff to plead by innuendo the facts showing the defamatory meaning of the statements”].)

Moreover, other than the conclusory statement of its president, DSN presented no evidence that it lost sales because of the defendants’ statements and made no effort to identify particular customers who heard and were negatively influenced by the statements. To prevail on a trade libel claim, the plaintiff must present evidence showing it suffered some pecuniary loss; it “may not rely on a general decline in business arising from the falsehood, and must instead identify particular customers and transactions of which it was deprived as a result of the libel.” (*Mann v. Quality Old Time Service, Inc., supra*, 120 Cal.App.4th at pp. 109-110; accord, *Erlich v. Etner, supra*, 224 Cal.App.2d at pp. 73-74.) DSN presented no evidence showing it suffered any pecuniary loss as a result of the statements that the stones originated in Mexico. DSN therefore failed to meet its burden of proving a prima facie case of trade libel.<sup>26</sup>

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<sup>26</sup> DSN contends in its supplemental brief that because Interweave did not directly challenge DSN’s claim of trade libel on the ground that DSN suffered no pecuniary loss from the statement that the andesine originated in Mexico, DSN was not required to present evidence on that point. To the contrary, once a defendant has established that a cause of action arose from protected activity, the burden is on the plaintiff to “state[] and substantiate[] a legally sufficient claim.” (*Mann v. Quality Old Time Service, Inc., supra*, 120 Cal.App.4th at p. 105.) The court reviews the pleadings and the evidentiary submissions to determine whether competent admissible evidence supports “a judgment in the plaintiff’s favor.” (*Ibid.*) DSN’s failure to present evidence on material elements of its claim precluded a finding that it had met its burden of demonstrating a probability of prevailing.

## 2. *Interference with Contract*

The complaint's second cause of action asserted a claim for interference with contract. "A claim for interference with contractual relationship requires a valid contract between the plaintiff and a third party, defendant's knowledge of this contract, intentional acts by a defendant designed to induce the disruption of the contractual relationship and actual disruption of the contractual relationship resulting in damage." (*Mann v. Quality Old Time Service, Inc.*, *supra*, 120 Cal.App.4th at p. 110.) The complaint alleged that DSN maintained a contract with the United States Olympic Committee that allowed it to sell andesine bearing the 2008 Beijing Olympic mark, and pled generally that DSN had contracts with "various customers" for the purchase and sale of andesine products. It asserted that defendants' allegedly "false and defamatory" statements disrupted its contractual relationships as part of a "wrongful scheme" to "denigrate DSN's products."

As noted above, DSN did not establish the defamatory or disparaging nature of the statements on which its trade libel claim was based. Moreover, DSN offered no evidence that any identified contract had been disrupted, and no evidence of resulting damages. Accordingly, it failed to present a *prima facie* case of interference with contract.

## 3. *Interference with Prospective Economic Advantage*

In its third and fourth causes of action, DSN asserted claims for negligent and intentional interference with prospective economic advantage. "[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." [Citation.]” (*Gemini Aluminum Corp. v. California Custom Shapes, Inc.* (2002) 95

Cal.App.4th 1249, 1256-1257, italics deleted, quoting *Westside Center Associates v. Safeway Stores 23, Inc.* (1996) 42 Cal.App.4th 507, 521, fn. 16.) DSN presented no evidence that defendants interfered with any particular relationship or expectancy. Moreover, DSN identified no wrongful conduct apart from the allegedly false and defamatory statements made about its product. As we have concluded the statements concerning treatment were not false and the statements concerning origin were not demonstrably defamatory, there is no support for the “wrongful conduct” element of the interference claims.

### **DISPOSITION**

The order denying the motion to strike is reversed. Interweave is awarded costs on appeal.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.